Supreme Court, U.S.
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No. 01-420

IN THE

Supreme Court of the United States

WILLIAM G. FLANIGAN, Individually and on behalf of all others similarly situated, *et al.*,

Petitioners,

v.

GENERAL ELECTRIC COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE GENERAL ELECTRIC COMPANY RESPONDENTS

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the General Electric Company ("GE") complied with its fiduciary obligations under the Employee Retirement Income Security Act of 1974 ("ERISA") when, as the court of appeals concluded, it "undertook a serious communication effort" to advise transferring employees concerning benefits to be provided by their prospective future employer, which was "timely" and "easily fulfilled any obligation on GE's part?"

2. Whether GE violated ERISA's general fiduciary provisions by effecting a transfer of pension assets and liabilities in its settlor capacity, which complied with Section 208 of ERISA by more than fully funding all accrued benefits under a defined benefit plan?

RULE 29.6 STATEMENT

GE has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondents General Electric Company, Dale F. Frey, Michael J. Cosgrove, John H. Myers, Joel R. Wilson, Arthur S. Bahr, Alan M. Lewis, Eugene K. Bolton and Donald W. Torey the ("GE Respondents") respectfully submit this brief in opposition to the petition for certiorari in this case.

STATEMENT OF THE CASE

This case arises out of the disposition in April 1993 by GE of its Aerospace business to Martin Marietta Corporation, presently known as Lockheed Martin Corporation ("Martin"). As part of that transaction, Martin agreed to offer employment to the employees of GE Aerospace and to provide them with employee benefits that were "substantially similar" to their GE benefits through the end of 1993. GE and Martin also agreed that the pension liabilities under the GE Pension Plan (the "GE Plan") of employees moving to Martin would be transferred to a new Martin pension plan (the "Martin Plan") along with plan assets that were *more* than sufficient to fund the accrued benefits of transferring employees.

In their petition for writ of certiorari, Petitioners seek review by this Court of three aspects of the decision below which found that this transaction fully complied with ERISA. The GE Respondents have an interest in only two of the court of appeals' holdings that are challenged by Petitioners:

1. The court's finding that there was no breach of fiduciary duty in connection with the communications that were made to Petitioners concerning the benefits that would be provided by Martin following the disposition of the Aerospace business; and

2. The court's finding that there was no breach of ERISA's general fiduciary provisions arising out of the transfer of pension assets and liabilities.[1]

FACTUAL BACKGROUND

I. FACTS RELATING TO PETITIONERS' CHALLENGE TO BENEFITS COMMUNICATIONS.

1. The transaction agreement for the disposition of GE's Aerospace business was finalized on November 22, 1992 and communicated to employees on November 23, 1992 (the "Agreement"). Pet. App. A at 34a. The Agreement provided in Section V.03 that, for calendar year 1993, transferred employees would have employee benefit plans at Martin "substantially similar" to those GE provided immediately prior to the Closing. Pet. App. A at 3a. The parties chose the phrase "substantially similar" because they recognized that legal and practical problems would prevent Martin from exactly duplicating GE's plans. For example, the GE 401(k) plan could not be duplicated because it offered an investment option in GE stock that would not be appropriate for Martin.

Beginning on November 23, 1992, an extensive communication program with employees about the details of the merger began. Between November 23 and December 2, 1992, the Petitioners received three separate communications about the benefit package that Martin would offer. Pet. App. B at 34a-36a. These benefits variously were described as "generally comparable," "substantially similar," "essentially the same," and "essentially equal," to GE's

1. The third holding concerns a claim challenging post-transaction events that was asserted only against co-defendant Martin.

programs. *Id.* In addition, beginning in December 1992, GE and Martin distributed to employees a series of weekly newsletters called "Teaming Updates." Pet. App. B at 36a. These newsletters were designed to keep employees apprised of the details of the merger and included information about post-closing benefits. The January 18, 1993 Teaming Update informed employees that the closing date of the sale to Martin would occur no earlier than mid to late March 1993, thereby giving employees an extended period to consider their options. Further, the February 19, 1993 Teaming Update definitively told employees that the current GE pension benefit formula would be the same formula used by the Martin Plan at least through June, 1994. Pet. App. A at 10a-11a. The March 10, 1993 Teaming Update stated that full benefits information would be provided the week of March 22, 1993, prior to the Closing, now delayed until after March 25, 1993. Pet. App. A at 9a. Finally, on March 23, 1993, a Teaming Update containing a complete benefit summary of Martin plans for 1993 was issued. Pet. App. A at 9a-11a. The information contained in the summary was entirely consistent with GE's stream of communications beginning four months earlier which indicated that Martin benefits would be "generally comparable," "substantially similar," and "essentially the same." The transaction closed on April 2, 1993. Pet. App. A at 3a, Pet. App. B at 48a.

2. This highly fact bound course of communications was extensively analyzed by the district court in its 85-page opinion. It concluded that Petitioners had

> not demonstrated that GE had any material information [about future benefits], as it was unable to speak [at an earlier date] about the benefits Martin would be offering after the

> closing. Moreover, plaintiffs have not shown that GE could have done anything else to allay their concerns regarding Martin's future benefits, given GE's fiduciary obligations and its lack of control of Martin's decision-making process.

Pet. App. B at 81a.

3. The Second Circuit affirmed. While applying well-established legal standards, the court concluded that the undisputed facts showed that "[t]hese communications easily fulfilled any pertinent obligation on GE's part." Pet. App. A at 10a. The court also noted that complete information concerning Martin benefits was supplied prior to the date on which employees had to make the final decision about transferring to Martin. The court concluded that this disclosure was "timely." Pet. App. A at 11a.

II. FACTS RELATING TO PETITIONERS' CHALLENGE TO THE PENSION TRANSFER.

1. The GE Plan is a defined benefit plan. Pet. App. B at 23a-24a. Such plans provide employees with a benefit which is determined by reference to a stated formula based on the employee's earnings and years of service. The benefit is *not* based upon the investment performance of the plan. The plan sponsor — in this case, GE — not the employee, assumes the investment risk with respect to the plan's assets. Pet. App. B at 25a. If the plan does not earn enough to pay the benefits, the plan sponsor must make up the difference by contributing more funds to the plan. If the plan's investment experience is better than expected, the plan sponsor may contribute less or nothing to the plan. At the time of the

transfer to Martin, the GE Plan contained an actuarial surplus, *i.e.*, its assets were greater than its estimated liabilities. Pet. App. A at 16a.

Under the terms of the Agreement between GE and Martin, GE agreed to transfer pension assets and liabilities associated with employees transferring to Martin to a new Martin Plan created to benefit such employees. Pet. App. B at 24a. It is undisputed that the assets transferred were more than fully sufficient to fund all accrued benefits of transferring employees and reflected a portion of the actuarial surplus calculated for the GE Plan. Pet. App. A at 16a, 19a, Pet. App. D at 123a. The transfer thus complied with Section 208 of ERISA and Section 414(1) of the Internal Revenue Code, which under the circumstances of this case mandated transfer of sufficient assets to fund fully all accrued pension benefits. *See* 29 U.S.C. § 1058; 26 U.S.C. § 414(1).

2. Petitioners allege that GE derived an unlawful benefit from transferring a portion of the overfunding to the Martin Plan either in the form of a higher price for the sale of its Aerospace business or in obtaining a more favorable position for dealing with certain government contract claims. They claim this purported ancillary benefit violated the terms of the GE Plan and ERISA's fiduciary duty and prohibited transaction rules. The district court properly rejected Petitioners' claim that any such indirect benefits violated ERISA. Pet. App. D at 131a-135a. The district court also rejected Petitioners' claim that they had an unconditional right to veto any transfer of their pension liabilities pursuant to the terms of the GE Plan. Pet App. D at 126a-127a. The Second Circuit affirmed. It noted that in deciding to transfer the pension benefits and related assets to a new pension plan, GE was acting as a settlor and not a fiduciary.

ERISA's general fiduciary provisions, therefore, did not apply to the decision to effect the transfer. Pet. App. A at 18a. The court further noted that "[a]lthough GE might have received some benefit, such as a higher sale price, because it was able to transfer some of the surplus to Martin . . . [i]n this case, all of the pension surplus that GE transferred . . . was used to fund pension benefits." Pet. App. A at 18a. The transfer thus did not violate ERISA's anti-inurement rules. Finally, the court noted that GE had complied with the specific provisions of Section 208 of ERISA that govern pension transfers by fully funding all accrued benefits. As a result, "because this was a defined benefit plan (a plan in which certain, discrete benefits are guaranteed), plaintiffs ended up receiving everything to which they were entitled." Pet. App. A at 19a.

REASONS FOR DENYING THE WRIT

This case does not merit review. The decision below presents none of the established grounds for exercise of certiorari jurisdiction and, in any event, is plainly correct in the aspects challenged by Petitioners.

The decision below is not in conflict with the decisions of this Court or any other court of appeals, and the court below did not depart from the accepted and usual course of judicial proceedings. Nor does the case present any novel question of federal law or threaten the ERISA framework Congress has established. Rather, it merely represents a straight forward application of well-settled ERISA law to a highly fact-bound dispute.

I. PETITIONERS ASSERT NO BASIS WHATSOEVER FOR REVIEWING THE SECOND CIRCUIT'S FACT-SPECIFIC HOLDING THAT GE DID NOT BREACH ANY FIDUCIARY DUTY UNDER ERISA IN COMMUNICATING WITH PETITIONERS ABOUT MARTIN BENEFITS.

In the first question presented, Petitioners seek review of the Second Circuit's determination that a new employer which effects a business acquisition has no fiduciary obligations under ERISA prior to closing to provide benefit plan information to a group of prospective employees who decline to accept employment. Although Petitioners do not expressly admit as much, their request for review appears limited to that portion of the court's decision that concerned such an alleged fiduciary duty on the part of Martin. In that respect, the GE Respondents agree with Martin that this issue was correctly decided below and that Petitioners' arguments relate to fact-bound questions that do not warrant this Court's review.

With respect to GE, however, Petitioners do not assert any basis for review of the court of appeals' determination that GE complied with ERISA's fiduciary requirements in its communications concerning Martin benefits. In reaching this determination, the Second Circuit recognized that GE was subject to ERISA's fiduciary requirements in communicating about future benefits; it articulated the well-established legal standards that govern such communications; and it applied these standards to a lengthy and complicated pattern of undisputed facts. It noted that GE's "communications easily fulfilled any pertinent obligation on GE's part" and that there was "no evidence that GE withheld material information concerning [Martin]

benefits, or that GE purposefully misled the plaintiffs in any way (the two requirements of a fiduciary breach in this situation)." Pet. App. A at 10a. The court also found that Petitioners had received full disclosure regarding Martin benefits prior to the date on which they were required to make a decision about transferring. The court concluded that this disclosure was "timely" under the statute. Pet. App. A at 11a. There is no reason for this Court to review this well supported and highly fact-bound determination. Petitioners do not even attempt to argue to the contrary.

II. THE RULING BELOW WITH RESPECT TO THE PENSION TRANSFER IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF EVERY COURT OF APPEALS WHICH HAS ADDRESSED THIS ISSUE.

1. Petitioners seek review claiming that the court of appeals' decision "insulate[s] all aspects of [a] pension asset transfer from ERISA scrutiny." Pet. at 14. This fundamentally mischaracterizes the decision of the court below. The court of appeals rejected Petitioners' claim that a transfer of assets to the Martin Plan which included actuarial surplus violated ERISA's fiduciary duty and prohibited transaction rules, holding that:

> Because GE's decision to spin-off the division along with its pension plan was, at its core, a corporate business decision, and not one of a plan administrator, GE was acting as a settlor, not a fiduciary, when it transferred the surplus to Lockheed. Therefore, GE's general fiduciary duties under ERISA were not triggered.

Pet. App. A at 18a.

This determination was plainly correct. A decision to spin off pension plan assets and liabilities involves fundamental decisions to create a new plan, to select its participants, and to make funding determinations with respect to the plan. These are all classic settlor functions that are not subject to ERISA's fiduciary rules. As this Court observed in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999):

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. . . . ERISA's fiduciary duty requirement simply is not implicated where [the employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated.

Accord Lockheed Corp. v. Spink, 517 U.S. 882, 891 (1996) (an employer does not act as a fiduciary when it establishes, modifies or terminates an ERISA-covered pension plan); *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1001-02 (7th Cir. 1993) (holding that funding decisions are not subject to fiduciary review under ERISA), *aff'd on other grounds*, 513 U.S. 414 (1995)

2. Petitioners' attempt to distinguish *Jacobson* and *Spink* from the GE case is utterly without merit. Petitioners argue that "neither *Spink* nor [*Jacobson*] involved any allegation of illegal employer conversion of plan assets or use of plan assets for a purpose other than actually paying benefits to participants." Pet. at 25. Neither does this case. As the court

of appeals noted, "[i]n this case, all of the pension surplus that GE transferred to Lockheed was used to fund pension benefits." Pet. App. A at 18a. Petitioners' shrill hyperbole and farfetched claims of criminal liability notwithstanding, *see* Pet. at 22, the undisputed fact remains that every penny of pension assets involved in this case was transferred to the trust established for the Martin Plan where the assets have been held for the exclusive purpose of providing benefits to participants in that plan.

Petitioners' real complaint is that GE derived some indirect benefit from the transfer, allegedly in the form of a higher sales price or an easing of difficulties with respect to government contracting issues. As the court of appeals observed, receiving such an "indirect" benefit does not violate ERISA. Pet. App. A at 18a. This determination is fully consistent with the decisions of this Court, which specify that the receipt of "incidental benefits" of this sort is "not impermissible under the statute." *Jacobson*, 525 U.S. at 445. *Accord Spink*, 517 U.S. at 893-94 (noting that an employer may derive a wide variety of advantages from its benefit plans, including "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily").[2]

2. Such indirect benefits are received routinely in mergers and acquisitions. *See, e.g.*, R. Raskin, *Corporate Mergers and Acquisitions*, in J. Mamorsky, ed., *Employee Benefits Handbook* 36-5 (ed. 2000) (noting that one of seller's "main interests" is "to obtain an increase in the purchase price for the business if excess [pension] assets are being transferred."). Indeed, since a rational purchaser cannot ignore the value of an overfunded pension plan in establishing a purchase price for an acquisition, the receipt of such indirect benefits appears unavoidable.

The fact that ERISA's fiduciary provisions are inapplicable does not, as Petitioners contend, insulate pension asset transfers from scrutiny under ERISA. Precisely because such decisions represent settlor conduct not subject to scrutiny under the fiduciary rules, Congress has prescribed specific funding requirements under Section 208 of ERISA, 29 U.S.C. § 1058, that ensure that a plan participant's accrued benefit is not adversely affected by a transfer of plan assets and liabilities. *See Bigger v. American Commercial Lines*, 862 F.2d 1341, 1344, 1348 (8th Cir. 1988); *Blaw Knox Retirement Plan v. White Consolidated Industries, Inc.*, 998 F.2d 1185, 1190 (3d Cir. 1993), *cert. denied*, 510 U.S. 1012 (1994); *Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 4 (6th Cir. 1988). By protecting the funding of accrued benefits, Congress has fully protected that which is promised in a defined benefit plan, *i.e.*, a formula driven benefit that is unrelated to the existence of surplus assets derived from investment returns.

There is no dispute that in this case the requirements of Section 208 were fully satisfied by the transfer to Martin. Accordingly, the court of appeals properly found that "plaintiffs ended up receiving everything to which they were entitled." Pet. App. A at 19a.

3. The attempt by Petitioners to seek review by manufacturing a conflict of authority in the lower courts is likewise unavailing. The decision of the Second Circuit is fully consistent with those of the four other circuits that have addressed the issue, each of which has squarely held that benefit plan transfer decisions are not subject to ERISA's fiduciary requirements:

Third Circuit: *Blaw Knox*, 998 F.2d at 1189 ("[Defendant] was acting in its corporate management role, and not in its role as plan administrator, with respect to the decision to transfer the pension plans.");

Sixth Circuit: *Hunter v. Caliber System, Inc.*, 220 F.3d 702, 719 (6th Cir. 2000) (transfer of assets from one fund to another fund pursuant to business agreement between the two plan sponsors was not a decision subject to ERISA's fiduciary obligations); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998) (company's decision to spin off division and transfer a share of that division's welfare benefit liabilities does not constitute discretionary plan administration subject to ERISA's fiduciary standards), *cert. denied*, 526 U.S. 1016 (1999);

Seventh Circuit: *Ames v. American National Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999) ("When company representatives are negotiating the sale of a division, they are not acting in their capacity as a plan fiduciary, and thus they do not bear the legal obligations that go along with fiduciary status.");

District of Columbia Circuit:	*Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1379-80 (D.C. Cir. 1998) (employer's allocation of assets in a pension spinoff in a manner that meets Section 208 but allegedly benefits employer to the detriment of employees does not implicate ERISA fiduciary standards).

Indeed, the only contrary authority Petitioners point to are two decisions from district courts. This Court, of course, does not normally grant review to address conflicts at the district court level. In any event, the alleged conflict is illusory. The one decision cited by Petitioners, *Coleman v. Pension Benefit Guaranty Corp.*, 94 F. Supp. 2d 18 (D.D.C. 2000), contains only a cursory discussion that does not even reference the settlor/fiduciary distinction. *Coleman* cannot be read to support Petitioner's position where that position has been squarely rejected by the very circuit in which the *Coleman* court sits. *See Systems Council EM-3*, 159 F.3d at 1376. The other case, *In Re Gulf Pension Plan Litigation*, 764 F. Supp. 1149 (S.D. Tx. 1991), *aff'd on other grounds*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995), was decided in 1991 well before *Spink* or *Jacobson* and has been appropriately criticized as being wrongly decided. *See, e.g.*, Siegel and Buckmann, *Plan Terminations and Mergers*, 1991 N.Y.L.J. June 10, 1991, at 3 ("The Court's ruling seems to be clearly wrong . . . ."). The case has not been followed in the ensuing ten years. Plainly this is not a conflict in authority warranting review by this Court.[3]

3. The Petition also makes a passing challenge to the lower courts' conclusion that the transfer was authorized under the terms of the GE Plan. The district court made this determination in a (Cont'd)

In short, the determination of the court of appeals represents a sound interpretation of the statute which is fully consistent with the decisions of this Court and every court of appeals to address the issue. Review by this Court is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(Cont'd)
well-reasoned opinion delivered orally from the bench which found that participants did not have an individual right to veto the transfer of these pension benefits pursuant to the terms of the GE Plan. The court of appeals affirmed without comment. This fact-bound interpretation of the GE Plan plainly does not merit review by this Court.